FILED
MAR 27 1980
MICHAEL RODAK, JR., CLERK

No. 79-1204

In the Supreme Court of the United States

OCTOBER TERM, 1979

NOLICHUCKEY SAND COMPANY, INC., PETITIONER

v.

RAY MARSHALL, SECRETARY OF LABOR,
UNITED STATES DEPARTMENT OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

WADE H. McCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1204

NOLICHUCKEY SAND COMPANY, INC., PETITIONER

v.

RAY MARSHALL, SECRETARY OF LABOR,
UNITED STATES DEPARTMENT OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

Petitioner contends that the provisions of the Federal Mine Safety and Health Act of 1977 that authorize warrantless safety and health inspections of mines are unconstitutional.

1. Petitioner operates a sand and gravel pit in Greene County, Tennessee. After a federal safety inspector was denied permission to conduct a warrantless inspection of petitioner's facility in April 1978, the Secretary instituted this action in the United States District Court for the Eastern District of Tennessee to enjoin petitioner from refusing to permit administrative inspections mandated by the Federal Mine Safety and Health Act of 1977, 30

U.S.C. (Supp. I) 801 *et seq.*[1] Following a trial, the district court granted the Secretary permanent injunctive relief (Pet. App. 9a-17a). The district court found that the mining industry is pervasively regulated under the Act and concluded that Congress has "broad authority to fashion standards of reasonableness for the purposes of Fourth Amendment searches" with respect to such closely regulated industries (*id.* at 13a).

The court of appeals affirmed (Pet. App. 1a-7a; 606 F. 2d 693). The court held that warrantless searches under the Act satisfy the standard of reasonableness under the Fourth Amendment, as construed in *Marshall* v. *Barlow's, Inc.*, 436 U.S. 307, 321 (1978). The court observed that Congress had found that all miners, including those in the sand and gravel industry, are exposed to unusually severe health and safety hazards (Pet. App. 5a). Because of these hazardous conditions, the court concluded that it was reasonable for Congress to provide for warrantless health and safety inspections of mine facilities (*id.* at 7a). In addition, the court noted that the Act's inspection provisions contain substantial privacy guarantees (*ibid.*).

2. Petitioner's contention (Pet. 8-14) that the decision below conflicts with the decision in *Marshall* v. *Barlow's Inc.*, *supra*, is identical to the argument that this Court recently declined to review in *Stoudt's Ferry Preparation Co.* v. *Marshall*, cert. denied, No. 76-614 (Jan. 7, 1980), and *Donofrio* v. *Marshall*, cert. denied, No. 79-848 (Feb. 19, 1980). For the reasons stated in the Secretary's brief in

[1]The parties stipulated that petitioner's facility is subject to the provisions of the Act (Pet. App. 20a). The Act refers to "coal or other mines," a phrase that is defined to include "an area of land from which minerals are extracted in nonliquid form * * *." 30 U.S.C. (Supp. I) 802(h)(1)(A).

opposition in *Stoudt's Ferry* (at pages 6-9),[2] we submit that warrantless safety inspections conducted pursuant to the Federal Mine Safety and Health Act of 1977 are consistent with Fourth Amendment requirements as interpreted by this Court in *Barlow's*.[3]

Moreover, the decision of the court of appeals in this case is in accord with the decisions of every other court of appeals that has considered the question. See *Marshall* v. *Stoudt's Ferry Preparation Co.*, 602 F. 2d 589 (3d Cir. 1979), cert. denied, No. 79-614 (Jan. 7, 1980); *Marshall* v. *Sink*, No. 77-2614 (4th Cir. Jan. 24, 1980); *Marshall* v.

[2]We are sending petitioner a copy of the Secretary's brief in opposition in *Stoudt's Ferry*.

[3]The fact that the sand and gravel industry has not had a long history of federal regulation does not affect the outcome of the Fourth Amendment analysis. As the court below correctly observed (Pet. App. 5a), Congress found that the sand and gravel excavation industry is the most hazardous industry with the single exception of underground coal and mineral mining. See also *Marshall* v. *Texoline Co.*, 612 F. 2d 935, 937 (5th Cir. 1980). Accordingly, Congress included sand and gravel operations in the pervasive regulatory scheme that now governs the entire mining industry.

In *United States* v. *Biswell*, 406 U.S. 311 (1972), this Court rejected the notion that the exception to the warrant requirement for administrative inspections of pervasively regulated industries applies only when there exists a long history of regulation. The Court stated (406 U.S. at 315) that "[f]ederal regulation of the interstate traffic in firearms is not as deeply rooted in history as is governmental control of the liquor industry, but close scrutiny of this traffic is undeniably of central importance * * *." Similarly, "close scrutiny" is clearly of overriding importance under the Federal Mine Safety and Health Act of 1977, and as in *Biswell*, "[l]arge interests are at stake" (406 U.S. at 315).

Texoline Co., 612 F. 2d 935 (5th Cir. 1980). In the absence of an intercircuit conflict on the question, review by this Court is unwarranted.[4]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. McCREE, JR.
Solicitor General

MARCH 1980

---

[4]Petitioner asserts (Pet. 15-17) that several district courts, in denying motions by the Secretary for preliminary injunctions under the Act, have taken positions contrary to that of the court of appeals in this case. But each of these decisions involved only a denial of preliminary relief and did not constitute a disposition of the case on its merits. In fact, all of the district courts that have finally adjudicated the issue have reached the same conclusion as the court below. See, *e.g.*, *Marshall* v. *Wallach Concrete Products, Inc.*, No. 79-422 (D. N.M. Mar. 5, 1980); *Rose Gravel Co.* v. *Marshall*, No. 79-795 (D. N.M. Nov. 23, 1979), appeal pending, No. 80-1027 (10th Cir.); *Marshall* v. *Wait*, No. S-78-11 PCW (E.D. Cal. May 12, 1978), appeal pending, No. 78-2345 (9th Cir.).

DOJ-1980-03